IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WILLIAM POPOFF

Petitioner

-and-

KATHY POPOFF

Respondent

Trial of issues of child custody, access and child support.

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Heard at Hay River, NT
on January 15, 16 & 17, 2001.

Reasons filed: February 05, 2001

The Petitioner represented himself.

Counsel for the Respondent: Arthur von Kursell

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REASONS FOR JUDGMENT

[1] This is a divorce action where the main issues are those of child custody, access and child support.

[2] The petitioner represented himself at this trial. This was not his preference but for one reason or another he was unable to obtain the services of counsel for the trial. He had counsel previously during the course of these proceedings but his last counsel withdrew from the case a few months before the trial. The petitioner initially asked for an adjournment at the start of the trial but, after being made aware of the lengthy delay an adjournment would cause, as well as considering the uncertainty as to whether he would be able to retain counsel, he decided to proceed with the trial. I must note here, as I did at the trial, that the petitioner handled the trial very adroitly and put forth relevant evidence and helpful submissions on his own behalf. I also note the co-operation extended by the respondent's counsel in these circumstances (but, of course, without ever compromising the interests of his client). It was a highly professional approach.

Facts:

[3] The petitioner husband is 47 years old and employed by the territorial government. The respondent wife is 40 years old and currently a student in a two-year nursing programme. The parties were married in 1980 and separated in late 1998 when the respondent moved out of the family home. They are the parents of four children: Matthew, almost 14 years old and currently in grade 7; Aaron, 11 years old and in grade 5; Julianne, 9 years old and in grade 4; and, Andrew, 8 years old and in grade 2.

[4] At present, the eldest child lives with his mother in Yellowknife while the other three children live with their father in Hay River. This is by the agreement of the parties but not in accordance with various interim orders issued previously in these proceedings. By an order issued on June 4, 1999, the petitioner was granted interim custody of all four children with access for the respondent. An application by the respondent to vary that order was dismissed on July 9, 1999. At that time an order was also made whereby both parents were prohibited from removing the children from Hay River. Finally, on September 3, 1999, an order was made whereby access would be exercised by the respondent on an alternating week basis.

[5] The reason for the current arrangement has to do with certain behavioural difficulties confronting the eldest child. After the separation of his parents, Matthew started acting out, being aggressive at school and at home with his father. The petitioner put the problem down to Matthew's strong loyalty to his mother and the emotional disturbance caused by the separation. Matthew was admitted to hospital and then assessed in an eight-week residential counselling programme. Eventually it was agreed that Matthew would live with the respondent. The petitioner felt it would be the safest environment for him and the least unpleasant alternative.

[6] During this entire period, spanning approximately the first eighteen months of the separation, the petitioner and respondent met with social service officials and family counsellors to try to reach agreement on child care issues, in particular on how to deal with Matthew's difficulties. The petitioner claimed that he wanted to develop some type of long-term parenting plan but the respondent would not co-operate. She would not go to the counselling sessions he said. For her part, the respondent testified that she did not co-operate with the counselling sessions because it seemed to her that those sessions always seemed to focus on her deficiencies and the petitioner was intransigent in his attitude that he have the legal custody of the children.

[7] I need not go into great detail about the history of the marriage or the conflicts that developed between the parties after their separation. I will say simply that, from all the evidence I heard, it is quite apparent that the parties were capable of working together and arranging their affairs for the benefit of the family as a unit. The irritants that each complains about since separation are very much those that arise in every such situation, some serious and some not so. But many of them are inevitable when a relatively long-term family unit breaks apart. I heard no evidence that would lead me to think that either of these people is anything less than a loving and caring parent who wishes only to do what is best for the children.

Custody:

[8] Each party wishes to have sole custody of the children. Neither one seems to have considered the prospect of joint custody although the petitioner did put forward a comprehensive proposal for an arrangement akin to shared parenting (although with legal custody vested in him).

[9] It is to state the obvious when I say that the only concern of the law in questions of custody is what is in the best interests of the children. The interests of the parents are relevant only insofar as they have an impact on the children's interests. As often said, a custody determination is not a quest for the perfect parent. Perfection exists in no one. What the courts do search for are signs of a genuine understanding on the part of each parent that they must act in all ways so as to promote the children's best interests. And, of course, one of the best ways to do that is by a high level of co-operation in parenting decisions.

[10] The *Divorce Act* (*Canada)* does not set out a detailed list of factors to be considered as part of the best interests evaluation. Instead, s.16(8) of the *Act* simply mandates that "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." There are only two other statutory criteria stipulated in the Act: s.16(9) says that past conduct shall not be considered unless it is relevant to the ability of the person to act as a parent; s.16(10) directs the court to take into consideration the willingness of each parent to facilitate contact by the child with the other parent on the principle that children should have as much contact with each parent as is consistent with their best interests.

[11] In addition to these criteria the case law has also developed various factors to be considered in determining the best interests of a child. In some jurisdictions, legislation such as the *Children's Law Act*, S.N.W.T. 1997, c.14, also set out various factors to be considered. These include such factors as the emotional ties between a child and each parent; the child's cultural and religious heritage; the child's views and preferences if they can be readily ascertained; the ability of each parent to provide the guidance, education and necessities of life (although strictly speaking the purely economic circumstances of a parent are not considered to be relevant to the person's ability to act as a parent); the stability of the environment in which the child has been living or will be living; the effect a change of environment will have on the child (this includes what is called the "sense of continuity" of the child, that is the length of time the child has lived in a particular situation); the benefits of keeping siblings together; and the status quo existing since

separation. This is not an exhaustive list. There may be other relevant factors. No one factor is determinative and there are no presumptions favouring any particular parent. In every case there must be an integrated assessment of all relevant factors based on the circumstances of the particular case.

[12] In this case I am satisfied that both parents have the ability to be good parents. Each can provide a stable and healthy environment. They each recognize the importance of facilitating access and maximizing contact between the children and both parents. There was nothing in the evidence about past conduct that would cause me to have serious concerns about either one's ability to act as a parent.

[13] Much of the argument at trial revolved around the question of the "status quo" and the need to maintain stability in the children's lives. The term "status quo" can have two meanings. It can mean the actual, ongoing arrangement that has been in place for a long time or it can mean the arrangement created by an interim custody order or some temporary agreement meant to stabilize things until a more permanent arrangement can be devised or ordered. Generally speaking temporary arrangements whether by order or otherwise are not considered sufficient to establish a true status quo. That would just encourage parents to jockey for position. Thus, in this case, the petitioner does not have a stronger claim simply because interim custody was granted to him. However, status quo in the sense of the ongoing way of life of the children has always been a significant consideration. Where a child has been in a certain stable environment then there should be strong evidence to show that it would be preferable to change to a different and uncertain environment.

[14] Here the eldest child has been living with his mother in Yellowknife for the past five months. I was told that his behavioural difficulties have lessened and he is doing well in his new environment. The other three children have lived continuously with the petitioner in Hay River since the separation. They, by all accounts, are well adjusted and comfortable in that environment. It seems to me that all four children have adjusted to this arrangement. Thus it can be said that this arrangement has come to be the status quo and to continue it would be the least disruptive for the children. Any alternative would likely destabilize the children's sense of continuity and alter the routine that has been established for their daily lives.

[15] Another factor is the clearly expressed desire of Matthew to live with his mother. While a child's preferences are not necessarily determinative of custody, the courts recognize that as a child gets older, and particularly in his or her teens, a custody order will not be workable unless it reasonably conforms to the wishes of the child. Here it

appears that there is a congruence between Matthew's wishes and what appears to be best for him in particular.

[16] With respect to the three younger children, their wishes and preferences are not so clearly defined. There was evidence from the respondent that when they have stayed with her and Matthew on access visits they expressed the desire to live together. Indeed this was one of the main thrusts of the respondent's argument in favour of sole custody to her: she wanted to reconstitute the family unit as it used to be with her as the primary caregiver. I must admit to some scepticism concerning the evidence as to the younger children's wishes. First, it is hearsay of a self-serving nature; second, one does not know in what context those sentiments were expressed (perhaps the children were simply enamoured with the greater variety of things offered in a larger town); and third, the children are still too young to allow their wishes to be persuasive. There was no objective evidence as to their preference. On the other hand there was evidence from two unrelated witnesses as to the stability and comfort provided to the three younger children by the petitioner.

[17] This leads to the next major factor, that being the traditional desire to keep siblings together. There is no presumption of law to this effect but it is generally thought to be in the best interests of children to avoid separating siblings. Courts have also recognized, however, that separating siblings may be appropriate in cases where there is a stable and successful *de facto* situation where the children are settled and happy in their respective homes. That appears to be the situation in this case.

[18] Earlier in these reasons I mentioned that neither party proposed joint custody. Yet it seems to me that joint custody may be the most beneficial situation for the children while maintaining the status quo (used in the broader sense). The current arrangement represents a successful *de facto* situation in which all of the children are settled and happy (or at least as happy as the children of separated parents can be). No evidence was adduced to support the proposition that the children's interests would be better served by removing them from the stable and secure environments in which they are now living.

[19] The advantages of a joint custody order are that both parents would enjoy equal parenting responsibilities for the care and upbringing of all the children, regardless of with whom any particular child resides. Decisions of importance must be made with the co-operation and participation of both parents. Here both parties have various strengths and weaknesses which could be balanced in a co-operative manner so as to feature the best qualities of each for the benefit of the children. The children, in my opinion, would benefit from exposure to what I perceive to be the differing qualities of both parents

(whether it be, for example, the more liberal and spontaneous nature of the respondent or the more disciplined and organized nature of the petitioner).

[20] The fact that the siblings are separated is another factor militating in favour of a joint custody order. It would not be healthy to have the interests of one child determined predominantly by one parent while those of the other children are determined by the other parent. Even though the children are living with different parents they should have somewhat similar guidance in their lives and that, in my opinion, can best be achieved by the joint involvement of the parents. I think that one of the reasons why joint custody was not considered by the parties was because they each put forth claims for sole custody of all four children (although the petitioner did show some acceptance of the fact that the present arrangement with respect to the eldest child may be best for him). With the formalisation of the *de facto* arrangement a joint custody order may be advantageous so that the upbringing of the children could be approached in a similar fashion notwithstanding the fact that they are living in separate homes.

[21] Generally speaking courts are reluctant to order joint custody in the absence of a history of co-operation and consultation by the parents. Usually, unless there is a history of effective joint decision-making after separation, a joint custody order has little chance of success. But such a history is not a prerequisite nor is the parties' agreement on joint custody a precondition. If such an award would be in the children's best interests then it should be ordered.

[22] Here the parties, while certainly exhibiting many of the animosities attendant upon a separation, still reflect an ability to co-operate and work together where the children are involved. One obvious example is the agreement on the *de facto* arrangement as to Matthew's residence notwithstanding the formal terms of the interim orders. Another example is the co-operation shown in arranging access visits. I am firmly of the opinion, based on all of the evidence presented to me, that these parents are capable of developing a co-operative parenting system and a joint custody order would act as an encouragement to them (and not as a hindrance to either one of them). It is certainly in the best interests of their children that they do so.

[23] I therefore order as follows:

1. The parties will have joint custody of the children of the marriage.

2. The primary residence of Matthew will be with the respondent.

3. The primary residence of Aaron, Julianne and Andrew will be with the petitioner.
4. The parties are to consult with each other on significant decisions respecting the children's education and health care and with respect to significant expenditures respecting the children where both parties will be contributing to such expenditures.

5. Notwithstanding the general obligation to consult with each other, the parent in whose home the children are residing will have the authority to make day-to-day and emergency decisions as to the children's activities and health needs.

6. Joint custody, for greater specificity, includes the right of each party:

   (a) To obtain all records relating to the children in relation to school, health, finances (if the children have bank accounts), and sporting or other extracurricular activities;

   (b) To obtain the children's report cards and notices of all of the children's activities directly from the children's schools; and make his or her own arrangements with the school to do so;

   (c) To attend a separate parent teacher interview with the children each time a parent teacher interview takes place; and make his or her own arrangements with the school to do so;
   (d) To obtain all extra-curricular schedules directly from the children's coaches or teachers; and make his or her own arrangements to do so;

   (e) To attend all activities for the children whether or nor the other parent is also in attendance;

   (f) To be acknowledged as a parent on all of the children's extra-curricular and school registration forms, and to have his or her contact number specified with the school;

   (g) To be notified by telephone at work and at home by the other parent of all medical emergencies relating to the children as soon as possible after the medical emergency arises.

[24] With respect to the residence arrangements, I recognize that the respondent's life may be somewhat unsettled until she graduates from her nursing programme and secures full-time employment. For that reason, the joint custody order will allow the parties to make alternative residential arrangements for the children from time to time so long as they are in agreement. Once the respondent's career plans become settled they may wish to reconsider the residential arrangements. This way the parties have that flexibility so long as they co-operate and work together (as opposed to a sole custody order where there is greater temptation for the custodial parent to act unilaterally).

[25] I also add the requirement that each party is to provide the other party with a minimum of sixty (60) days' written notice of any intention to relocate with the children (whether out of the jurisdiction or simply to another community within the jurisdiction).

Access:

[26] I think everyone agrees that it is in the children's best interests to maximize contact with both parents. Access is a right of the children so that they may benefit from the love and guidance of both parents. I am optimistic that the parents will be able to work out reasonable arrangements. I therefore make a general order that each party shall have reasonable and generous access with the child or children living with the other party upon such terms and at such times as the parties may agree upon. At a minimum, however, I order that, unless the parties otherwise agree, access will be exercised as follows:

1. The petitioner shall have access to Matthew for the month of July each year and the respondent shall have access to Aaron, Julianne and Andrew for the month of August each year. (My objective is to have all four children together for at least two months during each school summer vacation, one month with each parent.)

2. Each party shall have all four children for at least one-half of each Christmas school holiday.

3. The parties shall alternate having all four children for the spring school break, starting in 2001 with the respondent having the children, the petitioner having the children in 2002, and so on.

4. The children will have unrestricted telephone, mail and e-mail access to each of their parents regardless of which parent's home they are in at the time.

5. The parties will provide to each other an itinerary of the children's travel plans should either one of them take the children out of the jurisdiction for holidays or other purposes.

6. The costs of all access will be shared equally by the parties.

[27] I emphasize that the parties are free to agree on any additional or alternative access arrangements.

Child Support:

[28] It is trite to observe that parents have a joint obligation to provide financially for their children. The presumption is that support amounts will be based on the *Federal Child Support Guidelines.* The amounts prescribed by the Guidelines are based on research into reasonable spending patterns and child-care costs (relative to a payor's income) throughout Canada.

[29] The petitioner earns an annual income of $61,000.00. Since the respondent will have one child living with her, his monthly Guidelines support payment would be $537.00. The respondent's current income, consisting of student loans, is approximately $11,100.00 per year. This does not take into account earnings from summer employment. I think it would be reasonable to impute some income for seasonal employment so I will set her annual income for now at $13,500.00. Since the petitioner will have three children living with him, the respondent's monthly Guideline support payment would be $243.30. The two amounts are set off (pursuant to s.8 of the Guidelines) and the result is that the petitioner should pay to the respondent the sum of $293.70 per month.

[30] The petitioner, however, made the argument that I should impute income to the respondent because she is intentionally under-employed. He submitted that she is capable of obtaining remunerative employment in the field for which she has been trained (as a long-term care aid for the elderly) as opposed to going back to school for several years. The petitioner argued that the respondent's income should be based on what she is capable of earning.

[31] Certainly the Guidelines enable a court to impute income if a payor is intentionally under-employed or unemployed. Courts have often said that the payor's obligation is to take reasonable steps to obtain employment commensurate with such factors as age, health, education, skills and work history. But a decision as to whether a person is

capable of earning more income than he or she is presently earning depends on the context. Payor spouses are still entitled to make decisions in relation to their career path so long as those decisions are reasonable at the time they are taken considering all the circumstances. In my opinion, in this case, the respondent's decision to pursue a nursing degree is a reasonable one. I do not find that she is pursuing unrealistic goals; on the contrary I think she is to be commended for making the effort to improve her professional qualifications. These efforts will in the long term improve her financial circumstances and by extension those of the children. I therefore refuse to impute additional income to the respondent.

[32] I therefore order that the petitioner pay child support to the respondent in the amount of $293.70 per month. The payments will start on March 1, 2001, and continue on the first day of each month thereafter. There will be no adjustment for access periods. This amount is of course based on current incomes; as incomes change so will the respective amounts owing from one to the other.

Conclusions:

[33] At the trial of this action I issued the usual divorce judgment. Contained within these reasons are the terms of the corollary relief order. I expect respondent's counsel will prepare the formal order since the petitioner is unrepresented. I also understood from what was said at the trial that the parties agreed to defer the issues of spousal support and division of matrimonial property. The corollary relief order will therefore be silent on those issues and, if a hearing is necessary on either issue, I expect the parties will take the appropriate steps to obtain a hearing date. All previous orders in this case are set aside.

[34] Under the circumstances I am not inclined to make an order as to costs. If this is contentious, I will entertain written submissions within 30 days of the date of these reasons.

[35] I will conclude with one final observation directed to the parties. A large body of social science research confirms that parental separation presents an emotional challenge to even the healthiest children. Common sense tells us that as well. The bitterness and hostility engendered in parents by divorce proceedings flow through to the children. The research data is consistent in showing that a child's well-being is highly dependent on that child's perception of the quality of the relationship between the parents as parents. The

attitudes of the parents, how they interact with each other as well as with the children, become the most important factor in whether children successfully adapt to their post-separation lives. I am confident that the parties will act accordingly.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 5th day of February, 2001.

The Petitioner represented himself.
Counsel for the Respondent: Arthur von Kursell